

1 THE HONORABLE THOMAS S. ZILLY  
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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

9 BUNGIE, INC.,

10 Plaintiff,

11 v.

12 AIMJUNKIES.COM; PHOENIX DIGITAL  
13 GROUP, LLC; DAVID SCHAEFER; JORDAN  
14 GREEN, JEFFREY CONWAY; AND JAMES  
15 MAY,

Defendants.

No. 2:21-cv-811-TSZ

**PLAINTIFF BUNGIE, INC.'S  
SURREPLY IN OPPOSITION TO  
DEFENDANTS' MOTION FOR  
PARTIAL DISMISSAL OF  
PLAINTIFF'S FIRST AMENDED  
COMPLAINT**

26  
PLAINTIFF'S NOTICE OF  
INTENT TO FILE SURREPLY  
(No. 2:21-cv-811-TSZ)

157553001.1

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## I. INTRODUCTION

Plaintiff Bungie, Inc. (“Bungie”) requests that the Court strike the arguments raised on pages 1–7 §§ A - B of Defendants’ Reply in Support of Defendants’ Motion for Partial Dismissal of Plaintiff’s First Amended Complaint (Dkt. No. 56) (hereafter, “Reply”) because these are new arguments seeking new relief that were not asserted or requested in Defendants’ Motion for Partial Dismissal of Plaintiff’s First Amended Complaint (Dkt. No. 40) (hereafter, “Motion”). Bungie further requests that the Court strike page 13 of the Reply as exceeding the page limit permitted by this District’s local rules. *See Local Rules W.D. Wash. LCR 7(e)(3)* (“Reply briefs shall not exceed twelve pages.”).

## II. ARGUMENT

It is well-established in this Court that “[a]rguments cannot be raised properly for the first time on reply.” *Amazon.com LLC v. Lay*, 758 F. Supp. 2d 1154, 1171 (W.D. Wash. 2010); *see also AT & T Mobility LLC v. Holaday-Parks-Fabricators, Inc.*, No. C10-468Z, 2011 WL 5825714, at \*2 (W.D. Wash. Nov. 17, 2011) (Zilly, J.) (granting motion to disregard arguments asserted in support of motion to dismiss asserted for the first time in reply); *Nw. Coal. for Alts. To Pesticides v. U.S. E.P.A.*, No. C10-1919 TSZ, 2014 WL 309168, at \*4 (W.D. Wash. Jan. 28, 2014) (Zilly, J.) (granting motion to strike “new argument improperly raised for the first time in Intervenors’ reply” in support of a motion to dismiss). In their original Motion, Defendants asserted only two arguments for partial dismissal: (1) “Defendants Jeffrey Conway, David Schaefer [sic] and Jordan Green move to dismiss this action in its entirety pursuant to Rules 12(b)(2) and 12(b)(3) Fed. R. Civ. P. for lack of personal jurisdiction and improper venue;” and (2) “Defendant James May moves to dismiss the First Cause of Action (Copyright Infringement) under Rule 12(b)(6) Fed. R. Civ. P. for failure to state a claim for which relief may be granted.” Mot. at p. 1; *see generally* Mot. Likewise, in their proposed order, Defendants only requested that the “Motion [be] Granted” and that “Defendants Conway, Schaefer, Green, and May [be] dismissed from this case entirely.”

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1 Dkt. No. 40-6. Nowhere did they request dismissal of specific claims. In their Reply, Defendants  
 2 assert—for the first time—that (1) Bungie’s claims for secondary copyright infringement against  
 3 all Defendants should be dismissed (Reply at p. 1–4 § A) and (2) Bungie’s claim for direct  
 4 copyright infringement against Schaefer, Conway, and Green should be dismissed (Reply at p. 5–  
 5 7 § B).<sup>1</sup> Both arguments, and the newly-raised requested relief, should be disregarded.

6 As to the first new argument, Defendants spend four pages of their Reply discussing *MDY*  
 7 *Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928 (9th Cir. 2010) and how it allegedly requires  
 8 “dismiss[al of] any claim on the part of Bungie for ‘secondary’ or ‘induced’ infringement of  
 9 copyright.”<sup>2</sup> Yet nowhere in Defendants’ original Motion do they argue that *any* secondary  
 10 infringement claim should be dismissed, whether on the basis of *MDY* or any other grounds.  
 11 *Compare* Mot. at p. 9 (arguing that **direct** copyright infringement claim against **May** should be  
 12 dismissed, citing *MDY*) *with* Reply at p. 1–4 (arguing that **secondary** copyright infringement  
 13 claims against **all Defendants** should be dismissed).

14 As to the second new argument, in their Motion, Defendants never raised the issue of  
 15 whether copyright infringement was adequately pleaded against Schaefer, Conway, or Green. *See*  
 16 *generally* Mot. The only basis on which Defendants argued that any claim against Schaefer,  
 17 Conway, or Green should be dismissed is that the Court does not have personal jurisdiction or  
 18 venue under Fed. R. Civ. P. 12(b)(2), (3). Mot. at p. 1, 4–8. Now, their Reply asserts the novel  
 19 argument that Bungie “has not pleaded plausible facts” to show that Schaefer, Conway, and Green  
 20 are liable for direct copyright infringement, apparently asserting a brand new (and substantively  
 21 deficient) argument under Fed. R. Civ. P. 12(b)(6). Reply at p. 5.

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24       <sup>1</sup> It is unclear under which Federal Rule Defendants move to dismiss these claims because these arguments  
 25 were not asserted in Defendants’ Motion. This issue is exemplifies the problems created by Defendants’ improperly-  
 26 asserted arguments and is one of the myriad issues that, had Defendants asserted them at the appropriate time, Bungie  
 would have an opportunity to raise and address.

27       <sup>2</sup> It does not. If required to respond to this new argument, Bungie would demonstrate how *MDY* is inapposite  
 here and how Defendants mischaracterize the allegations in Bungie’s Amended Complaint.

1 Defendants' newly-raised arguments and requested relief, raised for the first time in their  
 2 Reply, should be stricken.

3 Finally, the local rules are clear that reply briefs in support of a motion to dismiss "shall  
 4 not exceed twelve pages." Local Rules W.D. Wash. LCR 7(e)(3). Defendants' thirteen-page  
 5 Reply exceeds this requirement, and Defendants did not seek or obtain approval from the Court to  
 6 file an over-length motion, as permitted by the local rules. *Id.* 7(f). This is not the first time  
 7 Defendants filed an overlength brief without seeking Court approval, nor is it the first time  
 8 Defendants violated other of this District's local rules. *See* Dkt. Nos. 38, 46 (Defendants filed a  
 9 Motion for Extension of Time improperly noted and after the deadline passed); Dkt. No. 55 at p.  
 10 1 n.1 (noting Defendants' failure to comply with LCR 26(c)(1) and reminding Defendants of their  
 11 obligation to comply with all local court rules); Dkt. No. 53 (Defendants filed eight-page reply  
 12 brief in support of its motion for protective order where LCR 7(e)(2) limits reply briefs in support  
 13 of protective orders to six pages). Despite this Court's recent warning, Defendants continue to  
 14 flout this District's local rules, and page 13 of their Reply should therefore be stricken.

### 15 III. CONCLUSION

16 Bungie therefore requests the Court strike pages 1–7 and 13 of Defendants' Reply.

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 19 Dated: July 15, 2022

By: /s/ William C. Rava

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